

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 8, 2019 appellant, then a 44-year-old nurse, filed an occupational disease claim (Form CA-2) alleging that she experienced an asthma attack as a result of factors of her employment. She recounted that she was sitting at her desk when housekeeping began cleaning the vents next to her and over her head. Appellant indicated that she first became aware of her illness and realized its relationship to her federal employment on January 18, 2019.

In a February 15, 2019 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant submitted a note dated February 25, 2019 from an osteopathic physician with an illegible signature who requested that the ventilation and walls be inspected for mold and asbestos due to appellant's health.

By decision dated March 18, 2019, OWCP denied appellant's claim, finding that the factual component of fact of injury had not been established. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 15, 2019 appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review.

Appellant submitted diagnostic testing reports. A January 18, 2019 chest x-ray examination report showed no acute cardiopulmonary process. A February 20, 2019 computerized tomography scan of the chest demonstrated no large central pulmonary embolus and normal pulmonary artery and thoracic aorta. A February 25, 2019 magnetic resonance imaging (MRI) scan of the brain revealed high-grade, near occlusive stenosis of the transverse sinuses at the lateral margins bilaterally.

OWCP also received additional medical evidence. In a January 18, 2019 occupational health progress note, Joyce E. Dorsey, a physician assistant, indicated that appellant was seen for complaints of "having a tickle in [appellant's] throat." She recounted that appellant had informed her that the overhead vents were cleaned in her area. On physical examination Ms. Dorsey reported mild wheezing on the left upper lobe.

A February 26, 2019 emergency room discharge report noted that appellant was admitted on February 21, 2019 and discharged on February 26, 2019 with diagnoses of fever, pseudo tumor, bacterial sepsis, chest pain, elevated bilirubin, obesity, and acute hypokalemia.

In a March 4, 2019 progress report, Dr. Larissa F. Giuliano, a family medicine specialist, indicated that appellant was evaluated for follow up of acute exacerbation of asthma and breast

nodule. She provided examination findings and assessed tension-type headache, neck pain, nocturia, overweight, and lump in right breast.

In a March 11, 2019 report and letter, Dr. Jeanne M. Edwards, a neurologist, recounted that appellant was treated for complaints of ringing in the ears, headaches, light sensitivity, double vision, blurred vision, and neck pain and stiffness. Neurological examination revealed 2+ deep tendon reflexes and intact sensation. Dr. Edwards advised that appellant had a medical condition that prevented her from working until March 21, 2019.

In a March 13, 2019 progress report, Dr. Giuliano noted appellant's complaints of persistent cough, tightness in her chest, and headaches. Upon physical examination of appellant's lungs, she observed normal breath sounds and good air movement. Dr. Giuliano assessed nausea, headache, and cough.

On April 11, 2019 appellant submitted her completed OWCP development questionnaire. She indicated that she was exposed to and inhaled dust when workers were cleaning out vents over her head. Appellant recounted that her chest became tight and she could not breathe. She noted that she eventually sought treatment at the hospital.

By decision dated August 5, 2019, OWCP's hearing representative modified the March 18, 2019 decision to find that appellant had established that she was exposed to dust on January 18, 2019, but denied the claim finding that the medical evidence of record was insufficient to establish a medical diagnosis causally related to the accepted employment factors.

On November 20, 2020 appellant, through counsel, requested reconsideration. Counsel noted that he was submitting a medical report, which provided a comprehensive discussion regarding causal relationship. He acknowledged that the reconsideration request was submitted more than one year after the date of OWCP's decision and explained that, due to the COVID-19 pandemic, appellant was unable to secure a report until after the one year deadline.

In an August 20, 2020 report, Dr. Karin Pacheco, a Board-certified internal, occupational, and allergy and immunology physician, noted that appellant began working for the employing establishment in 2009. She recounted that, in January 2019, a maintenance worker dusted the ventilation outlets located near appellant's desk and appellant developed a persistent cough and was unable to catch her breath. Dr. Pacheco indicated that appellant's symptoms continued to persist and she later developed fever, chills, cough, and myalgias. She reported that, in February 2019, appellant developed an onset of severe head pressure with fever and was diagnosed with idiopathic hypertension/pseudo tumor cerebri. Dr. Pacheco discussed the medical treatment that appellant received. She indicated that appellant's symptoms returned when appellant returned to the old portion of the employing establishment's hospital and improved when appellant was away from the hospital. Dr. Pacheco reported that, whenever appellant went to the employee health clinic, she developed headache and shortness of breath. Upon physical examination of appellant's respiratory system, she noted normal chest symmetry and expansion with normal respiratory effort. Dr. Pacheco assessed overweight, pseudo tumor cerebri, and shortness of breath with cough and myalgias consistent with a history of hypersensitivity pneumonitis. She indicated that the symptoms were associated with occupancy of the old portion of the hospital with a history of water damage and probable mold contamination.

By decision dated February 2, 2021, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).⁵ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁷ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request demonstrates clear evidence of error on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence

³ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁶ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ See 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); see also *id.* at § 10.607; *supra* note 5 at Chapter 2.1602.5(a) (September 2020).

⁹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ See *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

previously of record and whether the new evidence demonstrates clear evidence of error on the part of OWCP.¹² To demonstrate clear evidence of error, the evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹³

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed.

OWCP received appellant's request for reconsideration on November 20, 2020 more than one year after the last merit decision dated August 5, 2019.¹⁴ The Board notes, however, that OWCP's regulations unequivocally require that a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which a review is sought in order to be entitled to a merit review.¹⁵ Since the reconsideration request was untimely, appellant has the burden of proof to demonstrate clear evidence of error on the part of OWCP.¹⁶

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP.

In support of her untimely reconsideration request, appellant submitted a new report from Dr. Pacheco dated August 20, 2020. Although Dr. Pacheco addressed the issue of causal relationship, the Board finds that this report does not demonstrate clear evidence of error because it does not show that OWCP committed an error in finding that appellant failed to establish causal relationship between her medical condition and the accepted work exposure. As such, it does not raise a substantial question as to the correctness of OWCP's August 5, 2019 merit decision.¹⁷ Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁸

¹² *B.W.*, *supra* note 10.

¹³ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁴ *Supra* note 5.

¹⁵ *Supra* note 4.

¹⁶ *Supra* note 8.

¹⁷ *See D.R.*, Docket No. 21-0061 (issued May 24, 2021).

¹⁸ *W.R.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

The Board finds, therefore, that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying her occupational disease claim. Consequently, OWCP properly found that her November 20, 2020 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.¹⁹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ *O.K.*, Docket No. 21-708 (issued September 29, 2021); *S.C.*, Docket No. 19-1424 (issued September 15, 2020).